Office - Supreme Court, U.S.
FILED
AUG 25 1982
ALEXANDER L. STEVAS
CLERK

No. 81-2244

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1982

BRENDA GAIL GOOCHER,
Appellant

V.

THE STATE OF TEXAS,
Appellee

On Appeal From The
Texas Court Of Criminal Appeals

APPELLEE'S MOTION TO DISMISS OR AFFIRM

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant
Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

DOUGLAS M. BECKER*
Assistant Attorney General

BARBARA J. LIPSCOMB
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys For Appellee
Counsel of Record

QUESTIONS PRESENTED

I. WHETHER TEXAS PENAL CODE §43.23(a)(1) (VERNON 1977) IS UNCONSTITUTIONALLY VAGUE.

II. WHETHER THE EVIDENCE ADDUCED AT APPELLANT'S TRIAL WAS SUFFICIENT TO SUSTAIN HER CONVICTION FOR COMERCIAL EXHIBITION OF OBSCENE MATERIAL?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

MOTION TO DISMISS 3

I. APPELLANT'S CONSTITUTIONAL CHALLENGE TO FORMER §43.23, TEX. PENAL CODE (VERNON 1977), IS INSUBSTANTIAL 3

II. APPELLANT'S SUFFICIENCY OF THE EVIDENCE QUESTIONS ARE NOT WORTHY OF THIS COURT'S REVIEW 4

A. The question whether the Introduction of two films was sufficient to sustain Appellant's conviction does not require resolution by this court 4

B. The question whether the evidence against Appellant was sufficient under *Jackson v. Virginia*, 443 U.S. 307 (1979), is not properly before this court 6

MOTION TO AFFIRM 6

I. THE FORMER DEFINITION OF OBSCENITY IN TEX. PENAL CODE §43.23(a)(1) (VERNON 1977), WAS NOT UNCONSTITUTIONALLY VAGUE 6

II. THE EVIDENCE ADDUCED AT APPELLANT'S TRIAL WAS CONSTITUTIONALLY SUFFICIENT TO SUPPORT HER CONVICTION 9

A. The "unit of perception" rule was properly applied by the Court below 9

B. The evidence was sufficient to establish the elements of the charged offense 10

CONCLUSION 11

INDEX OF AUTHORITIES

CASES **PAGE**

Cox v. State, 368 S.W.2d 600 (Tex.Crim.App. 1963) 6

Goocher v. State, 633 S.W.2d 860 (Tex.Crim.App. 1982) 1

Hamling v. United States, 418 U.S. 87 (1974) 8

Jackson v. Virginia, 443 U.S. 307 (1979) 6

Jenkins v. Georgia, 418 U.S. 153 (1974) 8

Miller v. California, 413 U.S. 15 (1973) 4,7,8

Penthouse Intern., Ltd. v. McAuliffe, 610 F.2d 1354 (5th Cir. 1980) 9

Roth v. United States, 354 U.S. 476 (1957) 9

Smith v. State, 530 S.W.2d 955 (Tex.Crim.App. 1976) 10

United States v. Christian, 549 F.2d 1369 (10th Cir. 1977) 9

United States v. Petrillo, 332 U.S. 1 (1947) 7

United States v. Various Articles of Obscene Merchandise, 600 F.2d 394 (2d Cir. 1969) 8

STATUTES

U.S. Const. Amend. I 2

U.S. Const. Amend. XIV 2

§28 U.S.C. §1257 2

§43.21, Tex. Penal Code (Vernon 1977) 2,3,4,6

§43.23, Tex. Penal Code (Vernon 1977) 4

§43.21, Tex. Penal Code (Vernon Supp. 1982) 4

OTHER AUTHORITIES

Note, 17 Tex.L.R. 835 (1980) 8

No._____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1982

BRENDA GAIL GOOCHER,

Appellant

V.

THE STATE OF TEXAS,

Appellee

On Appeal From The
Texas Court Of Criminal Appeals

APPELLEE'S MOTION TO DISMISS OR AFFIRM

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Texas Court of Criminal Appeals.

OPINION BELOW

The written opinion of the Texas Court of Criminal Appeals affirming Appellant's conviction is reproduced as Appendix A to Appellant's Jurisdictional Statement. It is also published as *Goocher v. State*, 633 S.W.2d 860 (Tex.Crim.App.1982).

JURISDICTION

This is an appeal from a judgment entered by the Texas Court of Criminal Appeals on March 10, 1982, affirming Appellant's conviction in Johnson County, Texas, of comercial exhibition of obscene material. Appellant's timely filed motion for rehearing *en banc* was denied by the Court of Criminal Appeals on April 14, 1982. Notice of appeal was filed in the Texas Court of Criminal Appeals on April 29, 1982.

This Court has appellate jurisdiction under 28 U.S.C. §1257(2) to consider Appellant's first question. Appellant raised the issue of the statute's constitutionality in the Texas Court of Criminal Appeals and the decision was in favor of its validity.

Discretionary review of Appellant's second question is proper on writ of certiorari under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances.

U.S. CONST. amend. XIV:

> ...nor shall any State deprive any person of life, liberty, or property without due process of law.

§43.21, TEX. PENAL CODE (Vernon 1977):

(1) "Obscene" means having as a whole a dominant theme that:

(A) appeals to the prurient interest of the average person applying contemporary community standards;

(B) depicts or describes sexual conduct in a patently offensive way; and

(C) lacks serious literary, artistic, political, or scientific value.

STATEMENT OF THE CASE

The statement of facts contained in Appellant's Jurisdictional Statement is substantially correct.

MOTION TO DISMISS

I. APPELLANT'S CONSTITUTIONAL CHALLENGE TO FORMER §43.23, TEX. PENAL CODE (VERNON 1977), IS INSUBSTANTIAL.

The Texas obscenity statute under which Appellant was convicted defines[1] obscenity according to a three-part test. Material which describes or depicts certain types of "sexual conduct", which were set out in another part of the statute, is obscene if, in addition to meeting the remainder of the test, such conduct is depicted or described in a "patently offensive" manner. Appellant's claim here, as below, is that her conviction cannot stand because the term "patently offensive" is not defined in the statute, rendering it unconstitutionally vague.

---

1. As discussed below, the statute under which Appellant was convicted was substantially amended in 1982.

This question does not merit plenary consideration. First, as discussed below, the 1975 statute clearly met the standards announced by this Court in *Miller v. California*, 413 U.S. 15 (1973), and its enforcement did not violate Appellant's right to free speech or due process of law. Since Appellant's conviction, however, §43.21, which sets out the definition of obscenity, has been amended. The definition of obscenity now requires judges and juries to measure "patently offensive" depiction of sexual conduct according to community standards. TEX. PENAL CODE §43.23 (Vernon Supp. 1982). Thus, the particular infirmity alleged by Appellant has been cured, as Appellant concedes. *See*, Jurisdictional Statement, 12.

The narrow question raised here is not sufficiently important to require briefing and argument. Viewed as a whole, even the 1975 statute arguably required reference to community standards for a decision on offensiveness. *See*, Motion to Affirm, *infra*. In light of the recent amendment making that duty explicit, it is safe to say that the problem will not recur, or lead to arbitrary prosecutions.

II. APPELLANT'S SUFFICIENCY OF THE EVIDENCE QUESTIONS ARE NOT WORTHY OF THIS COURT'S REVIEW.

Appellant acknowledges that the only appealable issue presented concerns the constitutionality of the statute. Jurisdictional Statement, 5. She urges the Court to consider two additional issues pursuant to its certiorari jurisdiction; however, as will be shown, neither question merits discretionary review.

A. The Question whether the introduction of two films was sufficient to sustain Appellant's conviction does not require resolution by this Court.

Appellant complains that the State's introduction of only two out of the three films shown for the entrance fee was insufficient to sustain her conviction, since the law requires the material to be considered as a whole. She argues that the "whole" in this case comprises all three films. Appellant has not, however, demonstrated any reason why this Court of Criminal Appeals' decision is in conflict with the pronouncements of this Court, or that decisions of the Courts of Appeals or other state supreme courts are inconsistent. To the contrary, the cases reviewed by Appellee take the position that, unless there is some unusual connection, each movie is regarded as a discrete work. *See* Motion to Affirm, *infra*.

Moreover, the question of what composes the whole work is a preliminary one, and in the nature of a factual determination. Since there appears to be no confusion regarding the concept that the work must be considered as a whole, it would unjustifiably tax the limited resources of the federal courts to require case by case review of such preliminary determinations at the trial level. Even if it were error to sustain the conviction on the strength of only two films, this Court does not sit to correct individual injustices.[2]

The treatment of the issue by the court below does not appear to raise a substantial constitutional question even as regards Appellant's case. She acknowledges that "a prosecution may be instituted under existing law for each separate unit of perception exhibited..." Jurisdictional Statement, 16. Nevertheless, it is her position that the "unit of perception"

---

2. It is doubtful that any injustice resulted in this case. If the third film could have demonstrated some serious literary, artistic, or scientific value under the statute, Appellant presumably would have introduced it herself in rebuttal. She did not. Jurisdictional Statement, A-9, n.8.

concept as applied by the Texas courts may lead to prosecution "for isolated excerpts from material", such as one photo in a book or one scene in a movie. Jurisdictional Statement, 17. It has been held that such parsing of material is unconstitutional. But whether the Court of Criminal Appeals would allow it is purely speculative under the circumstances of this case. Appellant's issue is simply not sufficiently important to justify this Court's exercise of jurisdiction.

B. The question whether the evidence against Appellant was sufficient under *Jackson v. Virginia*, 443 U.S. 307 (1979), is not properly before the Court.

Appellant was convicted of commercial exhibition of obscene material. She now argues that, although the evidence showed that she sold tickets to the films, there was not evidence that she received any benefit. This claim was raised for the first time in a Motion for Leave to File Motion for Rehearing *En Banc*. Jurisdictional Statement, 10, 11, B-2 m.1. Under Texas law, therefore, the issue was waived, *e.g.*, *Cox v. State*, 368 S.W.2d 600 (Tex.Crim.App. 1963). Since the state courts did not have any fair or procedurally proper opportunity to decide the question, this Court should decline to consider it for the first time on a writ of certiorari.

MOTION TO AFFIRM

I. THE FORMER DEFINITION OF OBSCENITY IN TEX. PENAL CODE §43.23(a)(1) (VERNON 1977), WAS NOT UNCONSTITUTIONALLY VAGUE.

Appellant's sole ground for challenging the statute under which she was convicted is that the definition of obscenity failed to specify what was meant by the term "patently offensive", TEX. PENAL CODE §43.21 (Ver-

non 1977), and was therefore unconstitutionaly vague. Thus, she claims, she was deprived of her right to freedom of speech. U.S. CONST., amend I. It is clear, however, that §43.21 was intended to codify the test for obscenity set out by this Court in *Miller v. California*, 413 U.S. 15 (1973), which Appellant recognizes as the controlling authority. Jurisdictional Statement, 13.

The three-part test found in former §43.21 tracks almost exactly the *Miller* holding that the trier of fact must decide "(a) whether the average person, applying contemporary community standards—would find that the work, taken as a whole, appeals to the prurient interest, [citations omitted]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or social value." *Miller*, at 24.

This Court has recognized that obscenity statutes do not lend themselves to precision; due process does not require precision, so long as the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices..." *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947), quoted in *Miller, supra*, at 28, n.10. The *Miller* court was confident that the test expounded there would "provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." *Miller, supra*, at 27. The mere fact that "patently offensive" was not specifically defined does not render it unconstitutionally vague.

Th definition of obscenity in the statute was explicitly adopted with the intent to conform to the *Miller* test. Jurisdictional Statement, A-18, n.10. *Note, supra*, at 854, 855. Thus the content of the statute and meaning of its terms can be determined with reference to the *Miller* opinion, and later decisions explaining it. *See,*

e.g., Hamling v. United States, 418 U.S. 87 (1974); *Jenkins v. Georgia,* 418 U.S. 153 (1974); *United States v. Various Articles of Obscene Merchandise,* 600 F.2d 394 (2d Cir. 1969).

At any rate, Appellant's complaint with respect to what is patently offensive is very specific. She points out that the statute in effect prior to the version under which she was convicted, and the one currently in effect, "do state when conduct becomes patently offensive" by inserting the "contemporary community standards" language in the same sentence with "patently offensive". Jurisdictional Statement, 14. Her position is that since the 1975 version did not explicitly direct the fact-finder to apply contemporary community standards to the term, it is unconstitutional. This argument is meritless.

As the *Miller* court pointed out, finders of fact have always "been permitted to draw on the standards of the community, guided always by limiting instructions on the law...", (*Miller,* at 30). The Court did not even imply that the jury must be specifically instructed to apply those standards to every substantive term. Additionally, however, it is significant that the reference to community standards was not absent from the test in the 1975 statute, but was only contained in a different part. Since the test is conjunctive, the jury must apply community standards to the whole test, regardless of where it appears.[3]

3. One commentator concerning the new law has pointed out that the re-insertion of the language in the second part of the test, which is where Appellant considers it crucial, probably does not change the meaning of the text. *Note,* 17 Tex.L.Rev. 835, 855 n.114 (1980).

II. THE EVIDENCE ADDUCED AT APPELLANT'S TRIAL WAS CONSTITUTIONALLY SUFFICIENT TO SUPPORT HER CONVICTION.

A. The "unit of perception" rule was properly applied by the court below.

The principle articulated in *Roth v. United States*, 354 U.S. 476 (1957), that allegedly obscene material must be considered as a whole has been consistently followed in Texas and elsewhere. What constitutes the "whole", however, may depend on the circumstances. There has been some discussion regarding when magazines, newspapers, and the like must be considered one unit, but the cases seem to assume that each motion picture is a discrete work. *Penthouse Intern., Ltd v. McAuliffe*, 610 F.2d 1354, 1367 (5th Cir. 1980); *United States v. Christian*, 549 F.2d 1369 (10th Cir. 1977)[prosecution for one obscene film imported with several others]; Jurisdictional Statement, A-7, A-8. No court has ever held that the manner of payment controls this determination.

It is conceivable that two films could be thematically integrated so as to constitute a single unit of perception; however, that is not the case here. Appellant objected to the introduction of the two films shown to the jury. The deputy sheriff who executed the search warrant testified that each of the three films was a complete movie, and not part of one movie. (SF 101)[4] He also testified that different actors played in the different movies, and the story line or subject matter was different in each film. (SF 101, 102) The affidavit on which the warrant was issued corroborates his trial testimony. (Tr. 17-23).

---

4. "SF" refers to the statement of facts at trial. "Tr." refers to the transcript.

The State charged Appellant with commercial exhibition of two films. Each was shown to the jury in its entirety. Thus, the evidence was sufficient to sustain her conviction; the content of the third film was not relevant.

B. The evidence was sufficient to establish the elements of the charged offense.

Appellant and her co-defendants were charged with a violation of TEX. PENAL CODE §43.23 (Vernon 1977), which provides in part:

> (a) a person commits an offense if, knowing the content of the material:
>
> (1) he sells,...commercially exhibits, or possesses for sale...or commercial exhibition any obscene;

In *Smith v. State*, 530 S.W.2d 955 (Tex.Crim.App. 1976), the court defined "commercially exhibit" to mean "exhibit in exchange for valuable consideration". *Smith*, at 956. The unrebutted testimony of the deputy sheriff established that he paid four dollars to Appellant in return for admission to the theater, and that the films described in the search warrant were shown. (SF 87,88). While he was watching the films, the sheriff observed Appellant enter the theater more than once. (SF 93). From the place where the sheriff observed Appellant walking, he testified that it would have been "hard to miss" seeing what was on the screen. (SF 95).

Thus, the State proved every element of the offense. It is not clear whether Appellant had an ownership interest in the films or the theater. Such finding, however, is not necessary for conviction. Although the legislative history of the act indicates an intent to exclude some employees from criminal liability (Jurisdic-

tional Statement, B-10-11), neither the legislative history nor the text of the statute makes Appellant immune from prosecution.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Appellee respectfully prays that this Court dismiss the appeal for want of a substantial federal question or, in the alternative, affirm the decision of the Texas Court of Criminal Appeals.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant
Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

DOUGLAS M. BECKER
Assistant Attorney General
Assistant Chief,
Enforcement Division

BARBARA J. LIPSCOMB
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys For Appellee